



City of Albuquerque

Legislative File Number O-06-3 (version 2)

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## **CITY of ALBUQUERQUE SEVENTEENTH COUNCIL**

**Authorizing the Issuance and Sale Industrial Revenue Bonds for the Advent Solar,  
Inc. Project (Benton)**

## **CITY of ALBUQUERQUE SEVENTEENTH COUNCIL**

**AUTHORIZING THE ISSUANCE AND SALE OF THE CITY OF ALBUQUERQUE,  
NEW MEXICO TAXABLE INDUSTRIAL REVENUE BONDS (ADVENT SOLAR,  
INC. PROJECT) SERIES 2005 IN THE MAXIMUM PRINCIPAL AMOUNT OF  
\$25,000,000 TO PROVIDE FUNDS TO FINANCE THE EQUIPPING OF A  
MANUFACTURING FACILITY; AUTHORIZING THE EXECUTION AND DELIVERY  
OF AN INDENTURE, LEASE AGREEMENT, BOND PURCHASE AGREEMENT,  
THE BONDS, AND OTHER DOCUMENTS IN CONNECTION WITH THE  
ISSUANCE OF THE BONDS AND THE PROJECT; MAKING CERTAIN  
DETERMINATIONS AND FINDINGS RELATING TO THE BONDS AND THE  
PROJECT; RATIFYING CERTAIN ACTIONS TAKEN PREVIOUSLY; AND  
REPEALING ALL ACTIONS INCONSISTENT WITH THIS ORDINANCE.**

**WHEREAS, the City of Albuquerque (the "City") is a legally and regularly  
created, established, organized and existing municipal corporation of the State  
of New Mexico (the "State"); and**

**WHEREAS, pursuant to Sections 3-32-1 through 3-32-16, New Mexico  
Statutes Annotated, 1978 Compilation, as amended (the "Act"), the City is  
authorized to acquire industrial revenue projects to be located within, or within  
a 15-mile radius of, the City, to issue industrial revenue bonds and to use the**

proceeds of such bonds for the purpose of promoting industry and trade by inducing manufacturing, industrial and commercial enterprises to locate or expand in the State of New Mexico and promoting a sound and proper balance in the State of New Mexico between agriculture, commerce and industry; and

WHEREAS, Advent Solar, Inc. (the "Company") is a corporation organized under the laws of the State of Delaware and is authorized to do business in New Mexico; and

WHEREAS, the Company has requested that the City issue industrial revenue bonds for the purpose of providing funds to finance the equipping of a manufacturing facility (the "Project Property"); and

WHEREAS, the City Council ("Council") has adopted an ordinance establishing the Albuquerque Development Commission (the "Development Commission") to review projects proposed to be financed with industrial development bonds pursuant to City Resolution No. 16-1985, as amended; and

WHEREAS, the Company has presented to the Development Commission and the Council a proposal (the "Project Plan") whereby the City shall, pursuant to the Act, acquire certain equipment to be used as a portion of a manufacturing facility to be located [in the Mesa del Sol area of Albuquerque, New Mexico] and pursuant to which the City would issue its taxable Industrial Revenue Bonds in order to finance the Project; and

WHEREAS, the Development Commission has reviewed the Project Plan, has determined that the Company has complied with Resolution No. 16-1985, as amended, and has recommended approval of the Project Plan by the Council; and

WHEREAS, under the Company's proposal, the City would enter into an Indenture dated as of March 1, 2006 (the "Indenture"), among the City and a corporate depository satisfactory to the City to be designated at a later date, as depository (the "Depository"), pursuant to which, together with this ordinance (the "Bond Ordinance"), the City would issue its bonds designated as the City of Albuquerque, New Mexico Taxable Industrial Development Revenue Bonds

**(Advent Solar, Inc. Project), Series 2005 (the "Bonds"); and**

**WHEREAS, under the Company's proposal the City and the Company would enter into a Lease Agreement dated as of March 1, 2006 (the "Lease"), pursuant to which the Company will lease the Project Property from the City and will make payments to the Depositary sufficient to pay the principal of, redemption premium, if any, and interest on the Bonds and to pay all other obligations incurred pursuant to the provisions of the Lease and the Bond Ordinance; and**

**WHEREAS, the City is authorized to enter into the Lease, the Indenture, and other related documents and to issue the Bonds pursuant to the Act and the Bond Ordinance; and**

**WHEREAS, the Bonds in an aggregate principal amount not to exceed \$25,000,000 will be issued, sold and delivered by the City, in a private sale to Advent Solar Finance, Inc. (the "Purchaser") pursuant to a bond purchase agreement (the "Bond Purchase Agreement") among the City, the Purchaser and the Company; and**

**WHEREAS, the proceeds of the Bonds shall be applied to pay the costs of the Project and to pay certain costs associated with the transaction; and**

**WHEREAS, the Council has determined that it is in the best interest of the City to issue the Bonds and to execute and deliver the Bond Documents, defined below, and other documents related thereto; and**

**WHEREAS, there have been filed with the City Clerk and presented to the City Council the forms of the following documents:**

- 1. Project Plan**
- 2. Lease**
- 3. Indenture**
- 4. Bond Purchase Agreement**

**The Lease, the Indenture, and the Bond Purchase Agreement are collectively referred to in the Bond Ordinance as the "Bond Documents"; and**

**WHEREAS, the City is authorized to issue the Bonds under the Act and the Bond Ordinance and, after having considered the Company's proposal,**

including the Project Plan, has concluded that it is desirable at this time to authorize the issuance of the Bonds to finance the Project and that the City's issuance of the Bonds will constitute and be a valid public purpose; and

WHEREAS, this Council has been advised by the Company that the disclosure provisions of Rule 15c2-12 of the Securities and Exchange Commission are not applicable to this transaction inasmuch as the Bonds are being sold in a private sale without participation of an Underwriter; and

WHEREAS, there has been published in The Albuquerque Journal, a newspaper of general circulation in the City, public notice of the Council's intention to adopt this Bond Ordinance, which notice contained certain information concerning the ownership, purpose, location and size of the Project and the amount of the Bonds to be issued to finance the Project, which notice was published at least fourteen (14) days prior to final action upon this Bond Ordinance; and

WHEREAS, the City has delivered notice to the County of Bernalillo, State of New Mexico, of its intent to consider issuance of the Bonds, which notice was given at least thirty (30) days prior to the meeting at which final action is to be taken upon this Ordinance as required by Section 3-32-6.1, New Mexico Statutes Annotated, 1978 Compilation, as amended;

**BE IT ORDAINED BY THE COUNCIL, THE GOVERNING BODY OF THE CITY OF ALBUQUERQUE:**

**Section 1. RATIFICATION.** All actions not inconsistent with the provisions of this Bond Ordinance previously taken by the Council and the officials of the City directed toward approval of the issuance and sale of the Bonds be approved and the same hereby are ratified, approved and confirmed.

**Section 2. THE PROJECT PLAN.** The Project to be financed with the Bonds includes the acquisition of certain equipment and the payment of certain costs of issuance. The Company may use other available money to accomplish the Project. The Project Plan is hereby approved in all respects.

**Section 3. FINDINGS.**

**(A) General.** The Council hereby declares that it has considered all relevant information presented to it relating to the Bonds and the Project and hereby finds and determines that the issuance of the Bonds pursuant to the Bond Ordinance to provide funds for the Project is necessary and advisable and in the interest of and will promote the public health, safety, morals, convenience, education, economy and welfare of the City and the residents of the City.

**(B) The Council finds that:**

**(1) The Bonds will be issued for the purpose of financing the Project.**

**(2) The aggregate face amount of obligations to be issued with respect to financing the Project is \$25,000,000.**

**(3) The developer and operator of the Project is the Company.**

**(4) The Project is located [in the Mesa del Sol area of Albuquerque, New Mexico].**

#### **Section 4. BONDS - APPROVAL, AUTHORIZATION AND DETAIL.**

**(A) Approval and Sale.**

**(1) The issuance of the Bonds in the aggregate principal amount not to exceed \$25,000,000 and the use of the proceeds of the Bonds to finance the cost of the Project and to pay expenses relating thereto are hereby approved and confirmed;**

**(2) The sale of the Bonds at a purchase price of \$25,000,000 is approved.**

**(B) Form and Terms.** Subject to the limitations set forth in this Bond Ordinance the Bonds shall be (i) in the form and shall be numbered and dated all as set forth in the Indenture; (ii) payable as to principal and interest and subject to optional and mandatory redemption and defeasance in the amounts, upon the conditions and at the times and prices set forth in the Indenture; and (iii) issued in the principal amount of \$25,000,000, bearing

interest at the rates and maturing on the dates set forth in the Indenture; and

(C) Execution. The Mayor or the Chief Administrative Officer of the City of Albuquerque, New Mexico, shall sign the Bonds.

(D) Interest Rate. The interest rate on the Bonds shall not exceed 12% per annum.

**Section 5. AUTHORIZATION OF OFFICERS; APPROVAL OF DOCUMENTS; ACTIONS TO BE TAKEN.** The form, terms and provisions of the Bond Documents in the form on deposit in the office of the City Clerk are in all respects approved, authorized and confirmed.

The Mayor or Chief Administrative Officer of the City is authorized to execute and deliver in the name and on behalf of the City, and the City Clerk or Deputy City Clerk is hereby authorized to attest, as necessary, the Bond Documents and the Bonds with such changes therein as are not inconsistent with this Bond Ordinance.

The Mayor, Chief Administrative Officer, Treasurer and City Clerk are further authorized to execute, authenticate and deliver such certifications, instruments, documents, letters and other agreements, including security agreements, and to do such other acts and things, either prior to or after the date of delivery of the Bonds, as are necessary or appropriate to consummate the transactions contemplated by the Bond Documents.

The officers of the City shall take such action as is necessary to effectuate the provisions of the Indenture and shall take such action as is necessary in conformity with the Act to finance the costs of the Project and for carrying out other transactions as contemplated by this Ordinance, and the Bond Documents, including, without limitation, the execution and delivery of any closing documents, to be delivered in connection with the sale and delivery of the Bonds.

**Section 6. DELIVERY OF BONDS.** Upon the execution of the Bond Documents and the satisfaction of the conditions set forth in the Bond Documents, the Bonds shall be executed, authenticated and delivered to the

Purchaser. No Bond shall be valid for any purpose until such Bond has been properly authenticated as set forth in the Indenture.

**Section 7. FUNDS AND ACCOUNTS.** There are established in the Indenture, and on and after the date on which the Bonds are issued there shall be maintained, the funds and accounts as set forth in the Indenture. Other funds and accounts may be established as are necessary under the Indenture.

**Section 8. FINDINGS REGARDING PAYMENT OF INTEREST AND PRINCIPAL AND OTHER MATTERS.** The following determinations are made:

(A) The maximum amount necessary in each year to pay the principal of and interest on the Bonds, assuming issuance of the Bonds as of March 1, 2005, in the maximum amount of \$25,000,000 and bearing interest at the rate of 12%, is as follows:

<b>Year <u>Ended</u></b>	<b>Maturing <u>Principal</u></b>	<b>Interest <u>Amount</u></b>	<b>Total Debt <u>Service</u></b>
12/31/06	-0-	2,500,000	2,500,000
12/31/07	-0-	3,000,000	3,000,000
12/31/08	-0-	3,000,000	3,000,000
12/31/09	-0-	3,000,000	3,000,000
12/31/10	-0-	3,000,000	3,000,000
12/31/11	-0-	3,000,000	3,000,000
12/31/12	-0-	3,000,000	3,000,000
12/31/13	-0-	3,000,000	3,000,000
12/31/14	-0-	3,000,000	3,000,000
12/31/15	-0-	3,000,000	3,000,000
12/31/16	-0-	3,000,000	3,000,000
12/31/17	-0-	3,000,000	3,000,000
12/31/18	-0-	3,000,000	3,000,000
12/31/19	-0-	3,000,000	3,000,000
12/31/20	-0-	3,000,000	3,000,000

12/31/21	-0-	3,000,000	3,000,000
12/31/22	-0-	3,000,000	3,000,000
12/31/23	-0-	3,000,000	3,000,000
12/31/24	-0-	3,000,000	3,000,000
12/31/25	-0-	3,000,000	3,000,000
12/31/26	\$25,000,000	500,000	25,500,000

(B) It shall not be necessary to deposit any amount in a debt service reserve fund or a repair and replacement reserve fund for the maintenance of the Project Property.

(C) The Lease requires that the Company maintain the Project Property in good repair and condition (excepting reasonable wear and tear) and carry proper insurance (or self-insure) with respect to the Project Property.

(D) The Lease requires the Company to make payments sufficient to pay the principal of, premium, if any, and interest on the Bonds as principal and interest become due.

**Section 9. LIMITED OBLIGATIONS.** The Bonds shall be special limited obligations of the City, payable solely from the revenues derived from the Lease, and payable by the Company as described in the Indenture and shall never constitute a debt or indebtedness of the City or the State or any political subdivision thereof within the meaning of any provision or limitation of the State Constitution, statutes or home-rule charter of the City, and shall not constitute or give rise to a pecuniary liability of the City or a charge against its general credit or taxing power. Nothing contained in the Bond Ordinance or in the Bond Documents or any other instrument shall be construed as obligating the City (except with respect to the Project Property and the application of the revenues therefrom and the proceeds of the Bonds, all as provided in the Bond Documents), nor as incurring a pecuniary liability or a charge upon the general credit of the City or against its taxing power, nor shall the breach of any agreement contained in the Bond Ordinance, the Bond Documents, the Bonds or any other instrument be construed as obligating the City (except with



respect to the Project Property and the application of the revenues therefrom and the proceeds of the Bonds, all as provided in the Bond Documents), nor as incurring a pecuniary liability or a charge upon the general credit of the City or against its taxing power, the City having no power to pay out of its general funds, or otherwise contribute any part of the costs of constructing or equipping the Project Property, nor power to operate the Project Property as a business or in any manner except as lessor and seller of the Project Property.

**Section 10. APPROVAL OF INDEMNIFICATION.** The Council specifically approves the provisions of the Lease relating to indemnification which provide that the Company shall indemnify and hold harmless the City and its City Councilors, officials, members, officers, employees and agents against liability to the Company, or to any third parties that may be asserted against the City or its City Councilors, officials, members, officers, employees or agents with respect to the City's ownership of the Project Property or the issuance of the Bond and arising from the condition of the Project Property or the acquisition, construction and operation of the Project Property by the Company, except to the extent Section 56-7-1, New Mexico Statutes Annotated, 1978 Compilation, applies, and except claims for any loss or damage arising out of or resulting from the gross negligence or willful misconduct of the City or any member, officer, employee or agent of the City.

**Section 11. AMENDMENT OF BOND ORDINANCE.**

(A). **Limitations upon Amendments.** The Bond Ordinance may be amended by ordinance or resolution of the Council without the consent of the owner of the Bonds:

- (1) To cure any ambiguity, or to cure, correct or supplement any defect or inconsistent provision contained in the Bond Ordinance;
- (2) To grant to the Bond owners any additional rights, remedies, powers or authority that may lawfully be granted to them;
- (3) To obtain or maintain a rating on the Bonds from any rating agency if such amendment, in the judgment of nationally recognized

**bond counsel, does not materially adversely affect the owner of the Bonds;**

**(4) To achieve compliance with federal securities or tax laws; and**

**(5) To make any other change in the Bond Ordinance which, in the opinion of nationally recognized bond counsel, is not materially adverse to the owners of the Bonds.**

**(B) Additional Amendments. Except as provided above, the Bond Ordinance may only be amended or supplemented by ordinance adopted by the Council in accordance with the laws of the State, without receipt by the City of any additional consideration, but with the written consent of the owners of a majority of the principal amount of the outstanding Bonds which are affected by the amendment or supplement (not including Bonds which are then owned by or for the account of the City); provided, however, that no such ordinances shall have the effect of permitting:**

**(1) An extension of the maturity date of any Bond; or**

**(2) A reduction in the principal amount of, premium, if any or interest rate on any Bond; or**

**(3) The creation of a lien on or a pledge of revenues ranking prior to the lien or pledge the Bonds on pledged revenues; or**

**(4) A reduction of the principal amount of Bonds required for consent to such amendment or supplement.**

**(C) Proof of Instruments. The fact and date of the execution of any instrument under the provisions of this Section may be proven by the certificate of any officer in any jurisdiction who by the laws of that jurisdiction is authorized to take acknowledgments of deeds within that jurisdiction that the person signing the instrument acknowledged before him the execution of that instrument, or may be provided by an affidavit of a witness to the execution sworn to before such officer.**

**(D) Proof of Bonds. The principal amount and number of Bonds owned by any person executing such instrument and the date of holding that**

instrument may be proven by a certificate executed by a bank or trust company showing that on the date mentioned that person had on deposit with the bank or trust company the Bonds described in the Certificate.

**Section 12. BOND ORDINANCE IRREPEALABLE.** After any of the Bonds are issued, the Bond Ordinance shall be and remain irrepealable until the Bonds, including interest, are fully paid, canceled and discharged or there has been defeasance of the Bonds in accordance with the Indenture.

**Section 13. REPEALER.** All bylaws, orders, resolutions and ordinances, or parts thereof, inconsistent with this Bond Ordinance are repealed by this Bond Ordinance but only to the extent of that inconsistency. This repealer shall not be construed to revive any bylaw, order, resolution or ordinance, or part thereof, previously repealed.

**Section 14. SEVERABILITY.** If any section, paragraph, clause or provision of this Bond Ordinance shall for any reason be held to be invalid or unenforceable, the invalidity or unenforceability of that section, paragraph, clause or provision shall not affect any of the remaining provisions of this Bond Ordinance.

**Section 15. RECORDING; AUTHENTICATION; PUBLICATION; EFFECTIVE DATE.** This Bond Ordinance, immediately upon its final passage and approval, shall be recorded in the ordinance book of the City, kept for that purpose, and shall be there authenticated by the signature of the Mayor and the presiding officer of the City Council, and by the signature of the City Clerk or any Deputy City Clerk, and notice of adoption thereof shall be published once in a newspaper which maintains an office in, and is of general circulation in, the City, and shall be in full force and effect five (5) days following such publication.

**Section 16. GENERAL SUMMARY FOR PUBLICATION.** The title and a general summary of the subject matter contained in the Bond Ordinance shall be published in substantially the following form:

**CITY OF ALBUQUERQUE, NEW MEXICO  
NOTICE OF ADOPTION OF ORDINANCE**

Notice is hereby given of the title and of a general summary of the subject matter contained in City Ordinance Seventeenth Council Bill No \_\_\_\_\_ (the "Ordinance"), duly adopted and approved by the City Council of the City of Albuquerque, New Mexico, on February 22, 2006. Complete copies of the Ordinance are available for public inspection during the normal and regular business hours of the City Clerk in the office of the City Clerk, Albuquerque/Bernalillo County Government Center, One Civic Plaza, N.W., Albuquerque, New Mexico.

The title of the Ordinance is:

**ORDINANCE**

**AUTHORIZING THE ISSUANCE AND SALE OF THE CITY OF ALBUQUERQUE, NEW MEXICO TAXABLE INDUSTRIAL REVENUE BONDS (ADVENT SOLAR, INC. PROJECT) SERIES 2005 IN THE MAXIMUM PRINCIPAL AMOUNT OF \$25,000,000 TO PROVIDE FUNDS TO FINANCE THE EQUIPPING OF A MANUFACTURING FACILITY; AUTHORIZING THE EXECUTION AND DELIVERY OF AN INDENTURE, LEASE AGREEMENT, BOND PURCHASE AGREEMENT, THE BONDS, AND OTHER DOCUMENTS IN CONNECTION WITH THE ISSUANCE OF THE BONDS AND THE PROJECT; MAKING CERTAIN DETERMINATIONS AND FINDINGS RELATING TO THE BONDS AND THE PROJECT; RATIFYING CERTAIN ACTIONS TAKEN PREVIOUSLY; AND REPEALING ALL ACTIONS INCONSISTENT WITH THIS ORDINANCE.**

A general summary of the subject matter of the Ordinance is contained in its title. This notice constitutes compliance with Section 6-14-6, New Mexico Statutes Annotated 1978.

**CITY OF ALBUQUERQUE, NEW MEXICO**

By \_\_\_\_\_

**Millie Santillanes, City Clerk**

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<b>SECTION 1. RATIFICATION</b>	<b>4</b>
<b>SECTION 2. THE PROJECT PLAN</b>	<b>4</b>
<b>SECTION 3. FINDINGS</b>	<b>4</b>
(A) General	4
<b>SECTION 4. BONDS - APPROVAL, AUTHORIZATION AND DETAIL</b>	<b>5</b>
(A) Approval and Sale	5
(B) Form and Terms	5
(C) Execution	5
(D) Interest Rate	5
<b>SECTION 5. AUTHORIZATION OF OFFICERS; APPROVAL OF DOCUMENTS; ACTIONS TO BE TAKEN</b>	<b>5</b>
<b>SECTION 6. DELIVERY OF BONDS</b>	<b>6</b>
<b>SECTION 7. FUNDS AND ACCOUNTS</b>	<b>6</b>
<b>SECTION 8. FINDINGS REGARDING PAYMENT OF INTEREST AND PRINCIPAL AND OTHER MATTERS</b>	<b>6</b>
<b>SECTION 9. LIMITED OBLIGATIONS</b>	<b>7</b>
<b>SECTION 10. APPROVAL OF INDEMNIFICATION</b>	<b>8</b>

<b>SECTION 11. AMENDMENT OF BOND ORDINANCE</b>	<b>9</b>
(A). Limitations upon Amendments	9
(B) Additional Amendments	9
(C) Proof of Instruments	10
(D) Proof of Bonds	10
<b>SECTION 12. BOND ORDINANCE IRREPEALABLE</b>	<b>10</b>
<b>SECTION 13. REPEALER</b>	<b>10</b>
<b>SECTION 14. SEVERABILITY</b>	<b>10</b>
<b>SECTION 15. RECORDING; AUTHENTICATION; PUBLICATION; EFFECTIVE     DATE</b>	<b>10</b>
<b>SECTION 15. GENERAL SUMMARY FOR PUBLICATION</b>	<b>11</b>